

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

MITCHELL PATRICK HUBBELL

Defendant-Appellant

UNPUBLISHED

April 1, 2008

No. 278992

Isabella Circuit Court

LC No. 06-001655-FH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of criminal sexual conduct in the fourth degree (CSC IV), MCL 750.520e, and indecent exposure, MCL 750.335a. We affirm in part and vacate and remand in part. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, the 14-year-old sister of defendant's girlfriend, went to defendant's home to baby-sit. Defendant left with friends and returned to the home early the next morning, after drinking heavily at a party.

Complainant testified that she fell asleep on the couch, and awoke later to find defendant's penis touching her mouth as he stood over her. She knew that it was defendant because she could see his face. Complainant turned her head away, and defendant ran to the bathroom. Complainant testified that initially she thought that the incident might have been a dream because it was so shocking, but that she knew it was real when defendant emerged from the bathroom a few minutes later. Complainant maintained that she was positive that the incident occurred, and that she no longer had any doubts about its reality.

The trial court sentenced defendant to concurrent terms of five years' probation, with the first 11 months in jail, and two years' probation, with the first 11 months in jail, for CSC IV and indecent exposure, respectively. The trial court also imposed a fine of \$300 and costs of \$600 for the conviction of CSC IV, and a fine of \$100 and costs of \$200 for the conviction of indecent exposure. All fines and costs were due and payable immediately.

Defendant first argues that the evidence was insufficient to support his convictions. We disagree.

We examine the evidence de novo in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *People v Osantowski*, 274 Mich App 593, 612-613; 736 NW2d 289 (2007). A complainant's testimony alone, even if uncorroborated, is sufficient evidence to establish a defendant's guilt of CSC beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 126 (1998). Whether the complainant's testimony was credible is a matter for the factfinder, not this Court, to determine. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999)

To establish the offense of CSC IV, the prosecution was required to prove beyond a reasonable doubt that: (1) defendant intentionally touched complainant with his penis; (2) the touching was done for sexual purposes or could reasonably be construed as having been done for a sexual purpose; (3) complainant was 13, 14, or 15 years old at the time of the alleged act and defendant was then five or more years older than that; and (4) defendant used force or coercion to commit the sexual act. Force or coercion is defined in the statute as, among other things, "when the actor achieves the sexual contact through concealment or by the element of surprise." MCL 750.520e(1)(b)(v).

To establish the offense of indecent exposure, the prosecution was required to prove beyond a reasonable doubt that: (1) defendant exposed his penis, and (2) defendant knew that he exposed his penis. MCL 750.335a.

The prosecution's evidence established that complainant was 14 years old at the time of the incident, that she knew defendant to be more than five years older than her, that when she awoke defendant's penis was touching her face, and that she knew it was defendant because she could see his face. The jury could infer from the testimony that defendant ran away when complainant awoke that defendant knew that he was exposing his penis. Although complainant admitted that she was shocked by the incident and for a period of a few minutes believed that it might have been a dream, she was certain that the incident had occurred when she heard defendant emerge from the bathroom. Therefore, the prosecution offered sufficient evidence for a rational trier of fact to find the essential elements of both crimes were proven beyond reasonable doubt. Even though defendant asserts that complainant's testimony is not credible because of her belief at one time that the incident could have been a dream, it was for the trier of fact to determine the credibility of proofs presented. *Avant, supra* at 506.

Defendant next argues that the trial court's order to pay court costs of \$600 for the CSC IV conviction and \$200 for the indecent exposure conviction should be vacated. We agree.

Defendant failed to object to the trial court's order; therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999).

A sentencing court may impose any fine, any cost, or may require the defendant to repay the cost of providing legal assistance. MCL 769.1k(1)(b)(i)-iii). The court may provide for the collection of amounts imposed at any time. MCL 769.1k(5).

Defendant's argument that the trial court erred in imposing costs without making findings on the record as to his ability to repay assumes that the order was for the reimbursement of attorney fees. We are unable to determine the extent to which the costs ordered to be reimbursed

include attorney fees. Plaintiff concedes that, to the extent the costs include attorney fees, defendant is entitled to a consideration of his ability to pay. *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). Absent record evidence that the trial court considered defendant's ability to pay, a remand is required for such consideration. Accordingly, we vacate that part of defendant's judgment of sentence assessing costs and remand to the trial court for a determination of defendant's current and future ability to pay.

Affirm in part; vacated and remanded in part.

/s/ Kirsten Frank Kelly

/s/ Donald S. Owens

/s/ Bill Schuette